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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. REUBEN ALVAREZ, Defendant and Appellant.	F077316 (Super. Ct. No. BF166655A) **OPINION**

THE COURT[*]

APPEAL from a judgment of the Superior Court of Kern County. Judith K. Dulcich, Judge.

Jennifer Mouzis, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Daniel B. Bernstein and Peter H. Smith, Deputy Attorneys General, for Plaintiff and Respondent.

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[*] Before Detjen, Acting P.J., Meehan, J. and Snauffer, J.

Appellant Reuben Alvarez pled no contest to dissuading a witness (Pen. Code, § 136.1, subd. (a)(1)/count 1),[1] domestic violence with a prior conviction (§§ 273.5, subd. (a) & 273.5, subd. (f)(1))/count 3), and violating a protective order with a prior conviction for violating a protective order (§ 273.6, subd. (d)/count 5). Alvarez also admitted a great bodily injury enhancement in count 3 (§ 12022.7, subd. (e)).

On appeal, Alvarez contends part of his sentence violates section 654's prohibition against multiple punishment. We affirm

FACTS

Alvarez dated the confidential victim (CV) for five years and had two children with her. On May 22, 2015, the CV obtained a protective order against Alvarez that had a duration of three years.

On November 1, 2015, Alvarez barged into the CV's house and went into her bedroom. When the CV confronted him, they began struggling over the door to the room, breaking it. Alvarez then punched the CV on the chin with an upper cut, knocking her out. The blow left a knot and a bruise under the CV's chin and her head hurt for about a day.

During November 2015, Alvarez went to the CV's house in Bakersfield about seven times. Alvarez would get in through the back door, which could not be locked, go in the house to see if anybody was there, and run off before the CV had a chance to call the police.

On December 9, 2015, the CV was in her bedroom watching television with her two-year old daughter when she heard the back door opening. She went to check and found Alvarez opening the door. The CV told Alvarez, who appeared to be under the influence of alcohol and methamphetamine, to get out and he started arguing with her.

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[1] All further statutory references are to the Penal Code, unless otherwise indicated.

She then told Alvarez she was going to call the police and began walking to the front door to go to her father's house, which was located in the back of her house. As the CV and her daughter went out the door, they started running. However, Alvarez cut the CV off before she got to the gate to the fence enclosing her father's yard. Alvarez closed the gate, told the CV he was going to "make it worth it" if she called the police, and hit her on her right eye.

The CV stumbled and Alvarez struck her again in the mouth. She did not recall what happened after that. However, as she lay unconscious on the ground, Alvarez punched the CV approximately 20 times. The CV's father then fought Alvarez for several minutes before he grabbed a shovel and brandished it, causing Alvarez to flee. When the CV regained consciousness, her father was trying to help her up and her whole face hurt.

During the assault, the CV sustained a laceration above her left eyebrow that required seven stiches, split upper and lower lips that also required stitches, an avulsion to her upper middle tooth, and an ethmoidal blow-out fracture to her nose.

On April 7, 2017, the Kern County District Attorney filed an information that, in addition to the charges and allegations Alvarez pled to, also charged him with torture with great bodily injury (§§ 206 & 12022.7/count 2), battery with serious bodily injury (§ 243, subd. (d)/count 4), two counts of child endangerment (§ 273A, subd. (a))/counts 6 & 8), another count of domestic violence with a prior conviction (§ 273.5, subd. (a)/ count 7), a great bodily injury enhancement in that count, stalking in violation of a protective order (§ 646.9, subd. (b)/count 9), and three prior prison term enhancements (§ 667.5, subd. (b)).

On January 3, 2018, Alvarez entered his plea, as noted above, in exchange for a stipulated prison term of 10 years: the aggravated term of five years on his domestic violence conviction in count 3, a five-year great bodily injury enhancement in that count

and concurrent terms on his dissuading a witness conviction in count 1 and his violating a restraining order conviction in count 5.

On February 15, 2018, the court, without objection, sentenced Alvarez to the stipulated, aggregate prison term of 10 years that included concurrent three-year terms on his convictions in counts 1 and 5.

DISCUSSION

Alvarez contends the court should have stayed the concurrent terms imposed on his conviction in counts 1 and 5 because he committed the offenses underlying those counts as part of a continuing course of conduct with a single intent and objective. He further contends he did not forfeit this issue because by imposing a sentence that violated section 654, the court imposed an unauthorized sentence. We disagree.

Section 654, subdivision (a), provides, in pertinent part:

> "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision."

Section 654 precludes multiple punishments for a single act or indivisible course of conduct. (*People v. Miller* (1977) 18 Cal.3d 873, 885.) When applicable, section 654 bars concurrent sentences. (*People v. Radil* (1977) 76 Cal.App.3d 702, 713.)

California Rules of Court, rule 4.412(b)[2] provides, "By agreeing to a specified term in prison or county jail under section 1170(h) personally and by counsel, a defendant who is sentenced to that term or a shorter one abandons any claim that a component of the sentence violates section 654's prohibition of double punishment, unless that claim is asserted at the time the agreement is recited on the record."

> "Ordinarily, a section 654 claim is not waived by failing to object below. '[T]he [forfeiture] doctrine does not apply to questions involving

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2 All further references to rules refer to the California Rules of Court.

> the applicability of section 654. Errors in the applicability of section 654 are corrected on appeal regardless of whether the point was raised by objection in the trial court or assigned as error on appeal.' [Citation.] This is an exception to the general rule that only those claims properly raised and preserved by the parties are reviewable on appeal. This exception is not required by the language of section 654, but rather by case law holding that a court acts in excess of its jurisdiction and imposes an unauthorized sentence when it fails to stay execution of a sentence under section 654. [Citation.]
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> "The rule that defendants may challenge an unauthorized sentence on appeal even if they failed to object below is itself subject to an exception: Where the defendants have pleaded guilty in return for a *specified* sentence, appellate courts will not find error even though the trial court acted in excess of jurisdiction in reaching that figure, so long as the trial court did not lack *fundamental* jurisdiction. The rationale behind this policy is that defendants who have received the benefit of their bargain should not be allowed to trifle with the courts by attempting to better the bargain through the appellate process. [Citations.] While failure to object is not an implicit waiver of section 654 rights, acceptance of the plea bargain [is]. 'When a defendant maintains that the trial court's sentence violates rules which would have required the imposition of a more lenient sentence, yet the defendant avoided a potentially harsher sentence by entering into the plea bargain, it may be implied that the defendant waived any rights under such rules by choosing to accept the plea bargain.' [Citation.] Rule 412(b) and section 654 are, therefore, not in conflict. In adopting the rule, the Judicial Council merely codified one of the applications of the case law rule that defendants are estopped from complaining of sentences to which they agreed." (*People v. Hester* (2000) 22 Cal.4th 290, 294–295.)

Since Alvarez did not assert during his sentencing hearing that any component of his sentence violated section 654, he forfeited his contention that the court violated section 654 by imposing concurrent terms in counts 1 and 5. However, notwithstanding rule 4.412 and the Supreme Court's opinion in *Hester*, Alvarez contends he may still challenge the court's imposition of a concurrent term because he obtained a certificate of probable cause. Alvarez did not raise this argument in his opening brief. Thus, he forfeited it by his failure to do so. (*People v. Tully* (2012) 54 Cal.4th 952, 1075 ["It is

axiomatic that arguments made for the first time in a reply brief will not be entertained because of the unfairness to the other party."].) Nevertheless, even if Alvarez's contention were properly before us we would reject it.

In *People v. Cuevas* (2008) 44 Cal.4th 374, the Supreme Court held that a challenge to the maximum sentence that may be imposed under a plea bargain is a challenge to the validity of the plea, requiring a defendant to obtain a certificate of probable cause for the issue to be cognizable on appeal. (*Id*. at p. 376; accord, *People v. Young* (2000) 77 Cal.App.4th 827, 833.)

Alvarez cites these cases to contend that although they did not specifically hold that a certificate of probable cause "override[s]" rule 4.412(b)'s prohibition against appellate challenges to concurrent sentences on 654 grounds when the defendant does not object at sentencing, "the implication is that such would be the case." Alvarez is wrong.

Rule 4.412(b) does not prohibit a defendant from challenging a bargained-for sentence when the plea agreement provides for a lid, i.e., a maximum sentence. Therefore, the above noted holding of *Cuevas* and *Young* does not suggest that a plea bargain that provides for a stipulated sentence may be challenged if the defendant obtains a certificate of probable cause. Further, since at his sentencing hearing Alvarez did not object on section 654 grounds to the imposition of concurrent terms on his convictions in counts 1 and 5, his challenge to these terms is not cognizable on appeal.

DISPOSITION

The judgment is affirmed.